



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

HENDRY *v.* VIRGINIA RY. & POWER Co.

June 16, 1921.

[107 S. E. 715.]

**1. Negligence (§ 122 (1)\*)—Burden of Proof on Plaintiff, Relying on Last Clear Chance Rule.**—The burden is on a plaintiff, who is confessedly negligent, to prove by a preponderance of the evidence that after his peril became imminent there was a clear opportunity afforded defendant to save him from the consequences of his own negligence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 403.]

**2. Street Railroads (§ 103 (2)\*)—"Last Clear Chance" Rule Held Inapplicable.**—Where a pedestrian, in full possession of his faculties, observes the approach of a street car, but pays no further attention to it, and, with nothing to obstruct his view, undertakes to cross the street in front of it, and is immediately struck, he is guilty of clear neglect of duty, and the fact that he is struck is convincing proof that there was no last clear chance to save him, and that his own negligence was the proximate cause of his injury.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 841.]

Error to Circuit Court of City of Norfolk.

Action by Alexander Hendry against the Virginia Railway & Power Company. Judgment for defendant, and plaintiff brings error. Affirmed.

*Broudy & Peck*, of Norfolk, for plaintiff in error.

*W. H. Venable*, of Norfolk, and *E. R. Williams*, of Richmond, for defendant in error.

---

HINES, Director General of Railroads, *v.* BEARD.

June 23, 1921.

[107 S. E. 717.]

**1. Carriers (§ 316 (5)\*)—There Is a Presumption of Negligence from Mere Fact of Derailment.**—A passenger is not expected to know or required to prove the particulars of the negligence of the carrier in a derailment, and as it does not as a rule occur unless there is negligence on the part of the carrier, who is solely responsible for all instrumentalities of carriage, there is a presumption of negligence arising from the mere fact of derailment.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 705.]

**2. Carriers (§ 314 (2)\*)—Passenger Injured by Derailment May**

---

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**Aver Negligence Generally.**—In an action by a passenger injured by a derailment, negligence may be averred generally.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 397.]

**3. Judgment (§ 184\*)—Separate Counts Unnecessary in Proceeding by Motion.**—While a plaintiff may in the same declaration charge negligence in general terms in one count and specific acts of negligence in other counts, in a proceeding by motion, it is not necessary to have separate counts in the notice, and the case may be stated in a composite form, so that, while the notice cannot state too little, excess may as a general rule be treated as surplusage.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 396.]

**4. Carriers (§ 321 (21)\*)—Instruction as to Burden of Proof in Action by Passenger Injured in Derailment Erroneous.**—In an action by a passenger injured in a derailment, an instruction that the passenger was not required to point out any specific act of negligence, and there was a presumption that the accident was caused by the negligence of the carrier, but such presumption might be rebutted by evidence tending to show that the carrier exercised the highest degree of care to prevent the accident, and inspected its cars to see that they were in good order, etc., was erroneous, placing too great a burden on the carrier, in view of the fact that the uncontradicted evidence showed that after the accident the wheels and running gear of the train were in proper condition, for prior inspection would have disclosed no defect.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 737.]

**5. Carriers (§ 320 (22)\*)—Considering Presumption of Negligence with Other Evidence, It Is for Jury to Determine Whether Negligence in Derailment Case Has Been Established.**—The presumption of negligence on the part of a carrier arising from a derailment should be considered with the other evidence, and while, if there is no evidence but the fact of the accident, a passenger is entitled to recover, yet, if there is other evidence, it is for the jury to determine whether the carrier's negligence has been established by a preponderance of the evidence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 416.]

**6. Carriers (§ 316 (5)\*)—Passenger Has Burden of Showing Carrier's Negligence in Order to Recover.**—A passenger has the burden of showing the carrier's negligence in order to recover, and while the doctrine of *res ipsa loquitur* will relieve the passenger of the burden of introducing evidence, on showing that the injury was the result of derailment, yet the burden is not shifted, and if the carrier introduces evidence the passenger is not entitled to recover on mere equipoise.

---

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 344.]

**7. Trial (§ 296 (3)\*)—Erroneous Instruction Not Cured by Correct Instruction.**—Where plaintiff's instruction incorrectly stated the liability of the carrier, the fact that a correct instruction was given at the instance of the carrier will not cure the error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 745.]

Error to Circuit Court, Louisa County.

Proceeding by motion by J. W. Beard against Walker D. Hines, Director General of Railroads. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

*D. H. & Walter Leake*, of Richmond, for plaintiff in error.  
*W. Worth Smith, Jr.*, of Louisa, for defendant in error.

---

WALKER *v.* TEMPLE.

June 23, 1921.

[107 S. E. 720.]

**1. Limitation of Actions (§ 48 (2)\*)—Warrant of Attorney to Confess Judgment "at Any Time" Held Not to Accelerate Statute.**—Where contract for the payment of money at a designated date contained a power of attorney authorizing a designated attorney to confess judgment thereon "at any time from the date hereof, whether this obligation is payable or not," the statute of limitations (Code 1919, § 5810) did not begin to run until the creditor had a right, independent of the power of attorney, to bring an action on his demand under the contract; that is, the date when the amount was payable under the contract, notwithstanding the fact that the debtor or his agent might confess judgment on the claim "at any time" prior to that date.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 389.]

**2. Judgment (§ 41\*)—Clerk Held a "Court" within Warrant of Attorney to Confess Judgment.**—A power of attorney to confess judgment on a contract "in any court" authorizes confession of judgment before the clerk of the court, under Code 1904, § 3283 (Code 1919, § 6130), his proceedings in vacation being reviewable by the court at the next term under section 3293 (Code 1919, § 6140).

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 518. For other definitions, see Words and Phrases, First and Second Series, Any.]

Error to Circuit Court, Brunswick County.

Action by one Temple against one Walker. Judgment for

---

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.